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Case Nos. 95-1672 and 95-1881

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1995

ROSA WARE, BOOKER T. WADE, JR.,
GWENDOLYN MAY-BARLOW, AND HOPE SMITH
BYNUM, Joint Cross-Petitioners

v.

FEDERAL COMMUNICATIONS COMMISSION
and
UNITED STATES OF AMERICA,
Respondents

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

JOINT REPLY BRIEF OF CONDITIONAL CROSS-PETITIONERS FOR A WRIT OF CERTIORARI

Stephen T. Yelverton, Esq.
Counsel of Record
Yelverton Law Firm, P.C.
1101 30th St., N.W.,
Suite 500
Washington, D.C. 20007
Tel. 202-625-4321

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CROSS-PETITIONERS' REPLY BRIEF

Cross-Petitioners' Rosa Ware, Booker T. Wade, Jr., Gwendolyn May-Barlow, and Hope Smith Bynum, hereby submit their reply to the brief in opposition filed by the Respondents' Solicitor General and the Federal Communications Commission ("FCC").

The arguments of the Respondents show why the Court should grant the petition of Black Television Workshop of Los Angeles, Inc. and the related conditional cross-petition. Rather than directly address the key issues and cases raised by the petition and the conditional cross-petition, the Respondents obfuscate these key issues and cases in footnotes, or just simply ignore them.

I. The Court Should Grant the Petition of Black Television Workshop in Order to Resolve the Issue of the Applicability of the Automatic Stay Provisions of 11 U.S.C. 362 (a) of the Federal Bankruptcy Code to FCC License Revocation Actions.

The Respondents, at p. 15, of their brief in opposition contend that, because the petition of Black Television Workshop should be denied, the conditional cross-petition is required to be denied. However, the Court should grant the petition of Black Television Workshop in order to resolve the issue of the applicability of the automatic stay provisions of 11 U.S.C. 362 (a) of the Federal Bankruptcy Code to FCC license revocation actions.

This is an important Federal question of law. It deserves resolution by the Court because of the substantial impact of bankruptcy proceedings on the nation's

broadcasting industry and other Federally regulated businesses.

The key case governing resolution of the petition of Black Television Workshop is Board of Governors of the Federal Reserve System of the U.S. v. MCorp Financial, Inc., 502 U.S. 32 (1991). Therein, the Court addressed the issue of the applicability of the automatic stay provisions of 11 U.S.C. 362 (a) to an ongoing non-final administrative agency enforcement proceeding.

The Court held that the automatic stay did not apply to such ongoing non-final enforcement proceedings. However, the Court did state that if and when the agency's proceedings culminate in a final order, then it may well be proper for the Bankruptcy Court to exercise its concurrent jurisdiction in order to protect the property of the debtor estate. MCorp, 502 U.S. at 41-42.

In the case of Black Television Workshop, its license revocation is a final order of the FCC and is on judicial appeal. This is exactly the circumstance that the Court indicated would be subject to the automatic stay provisions of 11 U.S.C. 362 (a). Accordingly, the Court should grant certiorari in order to definitively resolve this important matter.

The protestations of the Respondents, at n. 3, that the MCorp decision is somehow not relevant to the circumstance of Black Television Workshop only underscores the need to grant certiorari. The Respondents erroneously contend that MCorp is not relevant because it did not

concern a license revocation proceeding, nor address the statutory provisions at issue here.

However, the Respondents ignore the fact that MCorp concerned an enforcement action against a Federally chartered bank and that the enforcement action had the potential to result in revocation of the bank charter, which is a Federal license. Moreover, the Respondents ignore the fact that the applicability of 11 U.S.C. 362 was squarely put into issue in MCorp and addressed by the Court. Id., 502 U.S. at 34-36 and 39-41.

The Respondents, at pp. 14-15, contend that the FCC is not required under its policies in Second Thursday Corp., 25 FCC2d 112 (1970), to stay all enforcement actions against a licensee merely because it has entered into bankruptcy. However, this is not the issue raised by the Petitioner.

The issue raised by the Petitioner is the FCC being required by a Federal Bankruptcy Court to stay a final order of revocation, not an ongoing enforcement proceeding. After the stay is entered, the FCC must then reconcile its revocation order with Federal bankruptcy policies protecting creditors. LaRose v. FCC, 494 F.2d 1145, 1150 (D.C. Cir. 1974). If the FCC is unable to reconcile its revocation order with Federal bankruptcy policies, then the Federal courts would resolve that issue on appeal. However, such issue is not now before this Court.

The Respondents fail to even acknowledge in their brief LaRose v. FCC, which requires the FCC to reconcile its policies, including revocation orders, with Federal

bankruptcy policies protecting creditors. This omission underscores why certiorari should be granted. The Respondents merely ignore key cases that contradict their arguments.

The Respondents, at pp. 3, 9, 11, and 13, suggest that an FCC license is not "property" of the debtor estate which would be subject to the jurisdiction of a Federal Bankruptcy Court. However, an FCC license is a "thing" of value and becomes property of the debtor estate at the time of filing the bankruptcy petition. L.B. Wilson, Inc. v. FCC, 170 F.2d 793, 798 (D.C. Cir. 1948). The FCC has heretofore recognized the jurisdiction of Federal Bankruptcy Courts over licenses as property of the debtor estate. O.D.T. International, 9 FCC Rcd 2575, 2576, para. 7 (1994).

Accordingly, the petition for writ of certiorari of Black Television Workshop raises important Federal questions of law requiring resolution by the Court, which the Respondents have either ignored or obfuscated in their brief. Thus, the petition should be granted.

II. The Court Should Grant the Conditional Cross-Petition Because the Respondents Fail to Respond to the "Denial of Due Process" Issues which were Raised by Ware, Wade, May-Barlow, and Bynum.

In their joint conditional cross-petition, Ware, Wade, May-Barlow, and Bynum raise important issues of Federal law as to denial of "due process" by the FCC. However, in their opposition brief, the Respondents fail to address or even

to acknowledge these issues and the matters raised therein.

Pursuant to Supreme Court Rule 15 (2), a brief in opposition should address any perceived misstatements of fact or law in the petition that bears on what issues would properly be before the Court if certiorari were granted. Any objection to consideration of a question presented based on what occurred in the proceedings below may be deemed waived, unless called to the Court's attention in the brief in opposition.

Accordingly, by not responding to or even acknowledging the denial of "due process" issues raised by the Cross-Petitioners, the Respondents' have waived any factual or legal objections they might have made disputing that the Cross-Petitioners were denied "due process" by the FCC. This failure to respond supports grant of certiorari.

In their opposition brief, at. n. 4, the Respondents merely refer to the joint conditional cross-petition as too "fact-bound" to warrant review by the Court because it attempts to relitigate the facts of the FCC proceeding. However, the joint conditional cross-petition clearly and succinctly raises six separate legal issues as to denial of "due process" by the FCC.

These issues are:

(1) Whether Rosa Ware was denied "due process" by the FCC's violation of Rule 615 (1) of the Federal Rules of Evidence in sequestering her from adverse witnesses?

(2) Whether Rosa Ware, Gwendolyn May-Barlow, and Hope Smith Bynum were denied "due process" by the FCC's attribution to them of purported disqualifying misconduct by Booker T. Wade, Jr.?

(3) Whether the Cross-Petitioners were denied "due process" by the FCC's failure to use the required "preponderance of [substantial] evidence" standard in determining disqualifying misconduct?

(4) Whether Booker T. Wade, Jr. was denied "due process" by the FCC's disqualification of him based upon allegations in which he had no notice?

(5) Whether Booker T. Wade, Jr. was denied "due process" by the FCC's disqualification of him based upon supposed representations by him which are not in the record?

(6) Whether the Cross-Petitioners were denied "due process" by the FCC's disqualification of them based upon a violation of a supposed FCC policy which does not exist?

These are legal issues, not a relitigation of the facts of the case. Moreover, these legal issues raise important questions of Federal law requiring resolution by the Court.

The FCC is the "gatekeeper" as to who is allowed to own or control broadcast stations, which are the most important medium of mass communications in this country. Its decisions as to who is qualified or not qualified to own or

control broadcast stations --- and thus be a trustee of a valuable public resource --- must be above reproach and must be in accordance with fundamental notions of fairness and "due process." Otherwise, the American people will have no confidence in the FCC's decision making process.

Accordingly, the joint conditional cross-petition for writ of certiorari of Ware, Wade, May-Barlow, and Bynum raises important questions of Federal law requiring resolution by the Court, which the Respondents have ignored. Thus, the joint conditional cross-petition should be granted.

Conclusions

WHEREFORE, in view of the foregoing, the petitions should be granted.

Respectfully submitted,

By:_____

Stephen T. Yelverton, Esq.
Counsel of Record for Rosa Ware,
Booker T. Wade, Jr., Gwendolyn
May-Barlow and Hope Smith Bynum

1101 30th St., N.W., Suite 500
Washington, D.C. 20007
Tel. 202-625-4321

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